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In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1490

FEDERAL POWER COMMISSION,

Petitioner,

v.

TEXACO, INC., et al.,

Respondents.

No. 72-1491

**DUDLEY T. DOUGHERTY, et al., Co-Executors of the
ESTATE OF MRS. JAMES R. DOUGHERTY, et al.,**

Petitioners,

v.

TEXACO, INC., et al.,

Respondents.

*On Writ of Certiorari to the United States Court of Appeals
For the District of Columbia Circuit*

**BRIEF FOR RESPONDENT
JAMES M. FORGOTSON, SR.**

OPINION BELOW

The Opinion of the Court of Appeals (FPC Pet., pp. 3a-22a)¹ is reported at 474 F. 2d 416 (D. C. Cir. 1972). The initial

¹ Reference "FPC Pet." is to the FPC's Petition for Writ of Certiorari in No. 72-1490. Reference "App." refers to the separately bound joint Appendix in this Court.

order (No. 428) of the Federal Power Commission (App. 135-154), its Order (No. 428-A) of Amendment (App. 159-161), and its Order (No. 428-B) denying rehearing (App. 238-253) are reported at 45 FPC 454, 45 FPC 548, and 46 FPC 47, respectively.

JURISDICTION

The Judgment of the Court of Appeals was entered December 12, 1972 (FPC Pet., pp. 23a-25a). The Federal Power Commission's (hereafter called FPC) Petition for Rehearing was denied on February 5, 1973 (FPC Pet., pp. 26a-28a). The Petition for a Writ of Certiorari was filed on May 3, 1973 and was granted on October 9, 1973 (App. 254).² The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) and § 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

Does the FPC have authority to exempt certain independent producers³ of natural gas from certain filing requirements and direct rate regulation with respect to interstate wholesale sales⁴ of natural gas under provisions of the Natural Gas Act of 1938, as amended, 15 U.S.C. §§ 717-717w (hereafter called the Natural Gas Act) by, among other things, shifting the burden of establishing the justness and reasonableness of rates

² The Court concurrently granted the Petition in No. 72-1491 — which sought review of the same Judgment of the Court of Appeals — and ordered the cases consolidated for oral argument (App. 254).

³ Independent producers are natural gas producers not affiliated with an interstate natural gas transmission pipeline company.

⁴ Wholesale sales of natural gas for interstate transmission, consumption or use.

for said sales from said producers to the purchasers⁵ despite the clear statutory language to the contrary? If there is statutory authority for the above-described scheme of regulation, does any and all FPC regulation⁶ of any independent producers of natural gas with respect to their interstate wholesale sales of natural gas constitute such invidious discrimination that it violates the Fifth Amendment to the Constitution of the United States and negate state conservation laws with respect to natural gas so that it violates the Tenth Amendment to the Constitution of the United States, making the above mentioned orders or any orders of the FPC affecting independent producers of natural gas void?

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Sections 4, 5, 7 and 16 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d, 717f and 717o are set forth in FPC Pet., pp. 85a-93a. U. S. Const. Amend. V and Amend. X are set forth in Addendum A to this brief, *infra*, p. A-1.

STATEMENT

This case involves judicial review of Orders 428 (App. 135-154) and 428B (App. 238-253) of the FPC, issued March 18, 1971 (App. 135-154). In summary, said Orders exempt completely from direct rate regulation by the FPC under the Natural Gas Act all existing and future interstate wholesale sales of natural gas by independent producers with

⁵ Purchasers are interstate natural gas transmission pipeline companies or other producers who buy natural gas for subsequent resale to the above mentioned pipeline companies.

⁶ Application of the Natural Gas Act and concomitant FPC regulation, including rate regulation.

less than ten (10) billion cubic feet of interstate wholesale sales per year.

A. Background

In 1954, this Court in *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672 (1954) held that interstate wholesale sales of natural gas by independent producers of natural gas were subject to the Natural Gas Act, the Rules and Regulations of the FPC promulgated thereunder, and the regulatory jurisdiction of the FPC. Among other things, that decision subjected the above-mentioned independent producers with respect to interstate wholesale sales of natural gas to rate regulation and various other limitations on their freedom to contract, such as restriction of their right to terminate selling gas under a gas sales contract after said contract had expired by its own terms.

A relatively complex regulatory program evolved over the next 16 years to regulate independent producers with respect to interstate wholesale sales of natural gas. Meanwhile, for whatever cause, a natural gas shortage developed in the United States. As part of an overall effort to cope with this shortage and to attract more natural gas to the interstate market, i.e. sale for transmission into or consumption or use in states other than the state in which said gas is produced, the FPC entered into the R-393 Rulemaking Procedure (App. 1-13) which led to the promulgation of Orders 428 and 428B described above.

B. Proceedings Before The Commission

The Orders in question arose from the FPC's Rulemaking

Proceeding, Docket No. R-393, to exempt certain independent producers from regulation, notice of which was filed on July 23, 1970 (App. 1-13).

James M. Forgotson, Sr. (hereafter called Forgotson) is an independent producer with production and interstate wholesale sales of natural gas in Louisiana and Texas. Within the deadline set by the FPC for filing written comments on the proposed Rule, Forgotson objected to the proposed rule on the ground that the FPC lacked jurisdiction to issue all regulatory orders under the Natural Gas Act affecting any independent producer of natural gas, because such jurisdiction subjects such independent producers to inappropriate federally administered public utility treatment and discriminates against such producers in a manner which is repugnant to the Fifth Amendment to the Constitution of the United States (App. 57-72), See *Morey v. Doud*, 354 U.S. 457 (1957).

Forgotson then, through his attorney, attended the conference regarding the merits of the proposed rule held by the FPC on December 8, 1970 (App. 97-134).

The FPC issued Order No. 428 on March 18, 1971 (App. 135-154). On March 31, 1971, Forgotson filed an Application For Rehearing (App. 155-158), protesting against the jurisdiction of the FPC to issue this or any other order affecting independent producers, which the FPC denied.

Forgotson sought judicial review, pursuant to Section 19(b) of the Natural Gas Act of Order No. 428 and Order No. 428B, which denied Applications For Rehearing on Order 428 (App. 238-253).

C. The Decision Below

Upon judicial review of the validity of Orders 428 and 428B the United States Court of Appeals for the District of Columbia Circuit, with one judge dissenting, set aside the above-mentioned FPC Orders after concluding that the FPC in issuing such Orders had exceeded its authority under the Natural Gas Act (FPC Pet., pp. 3a-22a).

That court's decision turned upon an analysis of specific provisions of the Natural Gas Act, namely, Sections 4, 5, 7 and 16 (FPC Pet., pp. 85a-93a). The court concluded, in effect, that the regulation of rates for interstate wholesale sales of natural gas was *mandatory*, and not discretionary or permissive, regardless of the volume of said sales by an independent producer in a given time period. In that connection, the FPC's Section 16 classification powers would not permit the exemption of the interstate wholesale sales of natural gas by certain independent producers from direct rate regulation under Section 4 of the Natural Gas Act (FPC Pet., pp. 7a-10a). That being the case, the court held that the FPC's Order Nos. 428 and 428B represented a clear-cut abdication of the FPC's statutory duty to assure that *all* regulated rates for interstate wholesale sales of natural gas, including those of the independent producers whose sales were exempted from direct rate regulation under Orders 428 and 428B, be "just and reasonable" (FPC Pet., pp. 10a-16a). This departure from statutory duty and standards through the so-called "indirect" mode of regulation at the pipeline or purchaser level was held to be contrary to the provisions of the Natural Gas Act.

"Nothing at all insures that those levels (of rates allowed to be passed on to consumers) will be 'just' or 'reasonable.'

That is the essential flaw in the Commission's plan. That is the point at which the FPC abdicates its regulatory responsibility in derogation of the purposes and mandatory terms of the statute. Indirect 'regulation' by such novel 'standards' is worse than an exemption simpliciter. Such an approach retains the false illusion that a government agency is keeping watch over rates, pursuant to the statute's mandate, when it is in fact doing no such thing." (FPC Pet., pp. 12a-13a).

SUMMARY OF ARGUMENT

As will be shown hereafter, the judgment below should be affirmed because: (1) the decision below is clearly correct as a matter of statutory interpretation and (2) the decision below is clearly correct as a matter of constitutional law even if the court below erred in statutory interpretation in reaching its decision. The arguments of the other Respondents dealing with the correctness of the decision below as a matter of statutory interpretation presented in their briefs are correct and substantially complete and will not be repeated here. The only argument to be presented here is the constitutional argument.

The primary thrust of the constitutional argument is that any and all FPC regulation of independent producers of natural gas with respect to interstate wholesale sales of natural gas, is unconstitutional because:

A. Said application and concomitant regulation, as time and experience have shown, constitutes invidious, capricious discrimination against these producers in violation of the guarantees of equal protection of the law, embodied in the due process clause of the Fifth Amendment to the Constitution of the United States.

B. The above-mentioned FPC regulation has had an adverse effect on the natural gas conservation policies of the states, depriving the states of what this Court in *Champlin Refining Company v. Corporation Commission of Oklahoma*, 286 U.S. 210 (1932) said is an inherent part of the police power — the prevention of above and below ground waste of oil and gas — and thereby violates the Tenth Amendment to the Constitution of the United States.

In addition, judicial removal of any and all FPC regulation of independent producers of natural gas with respect to interstate wholesale sales of natural gas should have no effect on any actions, sales, regulations or operations of such independent producers until after the effective date of said removal.

ARGUMENT

I

THE FPC DOES NOT HAVE ANY JURISDICTION OVER ANY INDEPENDENT PRODUCERS OF NATURAL GAS WITH RESPECT TO INTERSTATE WHOLESALE SALES OF NATURAL GAS BECAUSE ANY AND ALL FPC REGULATION OF INDEPENDENT PRODUCERS WITH RESPECT TO INTERSTATE WHOLESALE SALES OF NATURAL GAS VIOLATES PROVISIONS OF THE FIFTH AND TENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. ANY AND ALL FPC REGULATION OF INDEPENDENT PRODUCERS OF NATURAL GAS WITH RESPECT TO INTERSTATE WHOLESALE SALES OF NATURAL GAS CONSTITUTES INVIDIOUS DISCRIMINATION AGAINST THESE PRODUCERS IN VIOLATION OF THE GUARANTEES OF EQUAL PROTECTION OF THE LAW, EMBODIED IN

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES.

In light of current and evolving technology and economic developments in the energy industry, any and all FPC regulation of any interstate wholesale sales of natural gas by independent producers constitutes unconstitutional, invidious discrimination. This discrimination is against the independent producer in favor of the gas utility, each being a supplier of natural gas. Said discrimination is also against these same independent producers in favor of producers of energy-yielding commodities other than natural gas, i.e., crude oil, liquid petroleum condensates and gas, coal, and nuclear fuels. Because such discrimination is invidious, FPC regulation of independent natural gas producers is a violation of constitutional guarantees of equal protection of the law, and thereby violates the Fifth Amendment to the Constitution of the United States.

The equal protection of the law guarantees contained in the Fourteenth Amendment to the Constitution of the United States are provided against discriminatory acts of the Federal Government through inclusion of equal protection guarantees within the due process clause of the Fifth Amendment. See *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) and 349 U.S. 294 at 298 (1955), which by implication applied equal protection clause provisions to end racially segregated schools in the District of Columbia, which are governed by Federal, not state law. This Court in those cases stated that all provisions of *Federal*, state or local law requiring or permitting racial discrimination in public schools must yield. 349 U.S. 294 at 298 (1955).

The most recent decision of this Court applying constitutional equal protection of the law guarantees (of the Fourteenth Amendment) to invalidate economic regulation was *Morey v. Doud*, 354 U.S. 457 (1957). Forgotson's contention is that any and all FPC regulation of independent producers with respect to their interstate wholesale sales of natural gas violates the equal protection of the law guarantees against discriminatory economic regulation announced in *Morey v. Doud*, *supra*.

This is in spite of (1) the now substantially undisputed power of Congress to pass nondiscriminatory economic regulatory legislation under the commerce clause of the Constitution, *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937); and *Wickard v. Filburn*, 317 U.S. 111 (1942); and (2) the decisions that such regulation either by the states or the Federal Government does not constitute a deprivation of property without due process of law. *Federal Power Commission v. Natural Gas Pipeline Company*, 315 U.S. 575 (1942); *Nebbia v. New York*, 291 U.S. 502 (1934).

In *Morey v. Doud*, 354 U.S. 457 (1957), a ruling was affirmed, enjoining enforcement of the Illinois Community Currency Exchange Act of 1943, because the act violated the equal protection provisions of the Fourteenth Amendment.

The act in question provided a comprehensive system for licensing and regulation of community for-fee check cashing services and issuers of money orders and made operation of an unlicensed establishment a crime. In order to obtain a license, establishments were required to pay both licensing and investigative fees, furnish information to the Illinois State

Auditor's Office, maintain specified amounts of cash on hand and possess surety bonds in specified amounts. In addition, each exchange had to be financed and conducted as a separate business entity. Finally, a license could not be issued unless the State Auditor determined that its issuance would promote a convenience and advantage to the community. The American Express Company and its money orders were explicitly exempted from the provisions of the act.

The majority of this Court made the following points clear with respect to application of equal protection guarantees to economic regulatory legislation:

(a) The clause permits the exercise of a wide scope of discretion in classification and prohibits only those classifications that are purely arbitrary.

(b) The complainant must carry the burden of showing that the law in question does not rest upon any reasonable basis, but is essentially arbitrary.

(c) Regulatory legislation to be valid cannot single out any company or group of companies and create a closed class with accompanying economic advantages to the closed class. *Morey v. Doud*, 354 U.S.457 (1957).

Morey v Doud, supra, has never been overruled by this Court.

The wrong in the legislation invalidated in *Morey v. Doud*, supra, was that the American Express Company was given legal preference, particularly in the business of selling money orders.

The FPC stands on the authority of *Permian Basin Area Rate*

Cases, 390 U.S. 747 (1968), for upholding the constitutionality of FPC regulation of independent producers with respect to interstate wholesale sales of natural gas.

This Court in *Permian*, supra, never considered the equal protection question raised herein. In addition, former decisions of this Court sustaining the constitutionality of statutory laws do not preclude bringing subsequent suits to test their validity in light of later actual experience because statutory laws, valid when made, may become arbitrary in operation by reasons of later events. *Abie State Bank v. Bryan*, 282 U.S. 765 (1931).

This Court in *Permian*, supra, relied primarily on the cases, discussed immediately below, to determine the legality of the above-mentioned FPC regulation.

The first of those cases is *Munn v. Illinois*, 94 U.S. 113 (1876). That case arose upon an information action, filed in the Criminal Court of Cook County, Illinois, against public warehousemen for operating without a license. Mr. Chief Justice Waite dealt with the issues in the following way:

“There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own properties or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a *monopoly in them for that purpose*, if he will take the benefit of that monopoly, he must, as an equivalent, for his monopoly perform the duty attached to it on reasonable terms.

“ * * * [w]henver the accident of time casts upon a party the benefit of a legal monopoly of landing goods * * * he is confined to take the reasonable compensation

only * * * " *Munn v. Illinois*, 94 U.S. 113 at 127 (emphasis added)

Two other key decisions relied upon also turn on the necessity for rate regulation when applied to monopolistic situations. *Tagg Bros. and Moorhead v. United States*, 280 U.S. 420 (1924) involved monopolistic practices and price fixing by brokers at the Omaha, Nebraska stockyards.

The *New England Division Case (Akron, C & Y Ry. Co. v. United States)*, 261 U.S. 184 (1923), involved a means of distributing already regulated revenues from railroads, each of which at that time had a monopoly or a controlled oligopoly of a service covering a given territory or region. The Interstate Commerce Commission under the Transportation Act of 1920, 15 U.S.C. § 418 was simply allowed to try to assure an equitable division of profits in a clearly regulated, monopolistic or oligopolistic industry. See also *Covington and L. Turnpike Road Co. v. Sandford*, 164 U.S. 578 (1896) (a turnpike-transportation monopoly subject to rate regulation); *Acker v. United States*, 298 U.S. 426 (1936) (Chicago Stockyards — substantially similar to *Tagg Bros.*, supra.)

Another decision used to support rate regulation of the type carried out by the FPC is *Hegeman Farms Corporation v. Baldwin*, 293 U.S. 163 (1934). That decision really involved minimum prices or floors on a perishable and unique product, milk, and gave no consideration to the possible discriminatory effect of maximum prices.

The last major precedent relied on is *Bowles v. Willingham*, 321 U.S. 503 (1944). In that decision, the rent control provisions of the Emergency Price Control Act of 1942

(passed during the emergency of World War II), 50 U.S.C.A., Appendix 902, were challenged. This Court's decision rested on a point unrelated to the constitutional issues raised herein, namely that a nation which can demand the lives of its men and women during the waging of a great war is under no constitutional mandate to provide a system of price controls on the domestic front which will assure to each landlord a fair return on his property.

The discussion above clearly shows that this Court in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) did not consider the discrimination issue raised by Forgotson herein, but instead looked at the above mentioned FPC regulation, as an abstract proposition and concluded that it was supportable because non discriminatory rate regulation is permissible to deal with war emergencies or monopolistic situations or, where minimum rates are involved, to protect public health. It is Forgotson's contention that the above mentioned FPC regulation is discriminatory and cannot be justified in January, 1974, by the precedents used by this Court in *Permian*, *supra*.

It is Forgotson's contention that FPC regulation of independent producers of natural gas with respect to interstate wholesale sales of natural gas creates two closed or economically favored classes of energy suppliers which classes are given accompanying economic advantages, namely (1) gas utilities which can buy a premium fuel at non-competitive prices and (2) producers of all other energy-yielding commodities such as crude oil, coal and nuclear fuels who are, except in emergencies, subject only to state conservation laws and the market mechanism for determination of their prices. For this

reason said application is arbitrary, capricious and constitutes invidious discrimination unless it can be justified otherwise.

This Court in many previous cases has classified parties to natural gas regulatory litigation, involving independent producers with respect to interstate wholesale sales of natural gas, as producers, consumers and the FPC.

It has classified independent producers as producers, has equated gas utilities with consumers and has classified the FPC as the FPC. A better classification would be: Suppliers, which includes producers, interstate gas pipeline transmission companies and gas utilities; Regulators, which balance the interests of consumers and suppliers in the interests of social and economic justice (which includes the FPC and state public utility or service commissions and which *should* include the conservation commissions of the states); and Consumers, e.g., housewives or industrial enterprises using natural gas as a fuel.

It is Forgotson's contention in the case of gas utilities that equating them and their interests with the consumer and the consumer interest has resulted in placing a discriminatory burden on another member of the *Supplier* group, the independent producer, and given a preference to the gas utility, another member of that *same group* on the erroneous grounds that this is protecting the consumer interest.

The consumer interest is really different from the *interest* of the gas utility and it is the gas utility, not the consumer, that receives the direct benefits that accrue from overall FPC regulation of said independent producers, e.g., on August 10,

1971, the FPC ruled that a natural gas pipeline company must pass any refunds from its suppliers (primarily independent producers) on to its gas utility customers, even if there were no assurance that such refunds would reach the ultimate consumer. The Commission held that the money must be passed on to the gas utility, "leaving it to the state and local authorities to order further flow through." See *The Wall Street Journal*, p. 6, Col. 3, dated Wednesday, August 11, 1971.

Any and all FPC regulation of independent producers of natural gas with respect to interstate wholesale sales of natural gas results in the independent producers being regulated in a manner quite similar to gas utilities when in fact such regulation is inappropriate for said independent producers. This has resulted in placing the gas utilities in the position of an economically favored closed class.

What is being done to independent natural gas producers by FPC regulation of their interstate wholesale sales of natural gas goes beyond mere lack of wisdom, providence and harmony with a particular school of thought. *Williamson v. Lee Optical Co. of Oklahoma*, 348 U.S. 483 (1955). It constitutes regulation which in light of current conditions is arbitrary, invidious and discriminatory. It has created a closed-class of entrepreneurs within the Supplier group, the gas utilities, which are subject to risks in no way comparable to those of the independent natural gas producer. The gas utilities earn a guaranteed rate of return for their security holders and have a competitive advantage against other energy suppliers, because of their being able to buy their raw material at a controlled maximum price, free from market forces.

To meet the test of equal protection, all members of the group should be treated alike to the greatest extent possible. The test does not require either comprehensiveness of regulation or absolute mathematical equality of treatment. Neither does it require dealing with all facets of the problem at the same time, but allows legislative discretion to attack some evils before attacking others. Nevertheless, equal protection should not *permit* one member of a group to be regulated in order to advance the economic interests of another group or groups in the same class *without clear justification*. In the current situation interests of the gas utility members of the Supplier group are advanced at the ultimate expense of the independent natural gas producer.

It might be argued that the overall FPC regulation of the interstate natural gas sales of independent producers which results in their being treated like a gas utility is appropriate and places no discriminatory burden on said independent producers because both independent natural gas producers and gas utilities are public utilities. This Court dealt with that contention in 1968 when it stated:

"Producers of natural gas cannot usefully be classed as public utilities. They enjoy no franchises or guaranteed areas of service. They are intensely competitive vendors of a wasting commodity they have acquired only by costly and often unrewarded search." *Permian Basin Area Rate Cases*, 390 U.S. 747 at 756-757 (1968).

A major issue then is whether the result of FPC regulation of independent producers of natural gas with respect to interstate wholesale sales of natural gas must always be public

utility treatment which is inappropriate and constitutes invidious unconstitutional discrimination.

Forgotson's contention is that the answer to this question is yes for the reasons set out below.

It might be argued that independent producers of natural gas are not treated like public utilities by the FPC with respect to interstate wholesale sales of natural gas because the FPC need abide by no fixed formula and can pragmatically adapt policies and procedures to meet changing conditions. Forgotson's contention is that as a practical matter, there is and can only be public utility treatment of said sales by said independent producers, because that is all that a regulatory agency like the FPC can do. It can develop formulas *ad infinitum*, but they all have been and *perforce* will be based on allowing some "fair" rate of return on capital expenditures and operating costs with or without added artificial incentives to stimulate hoped for exploration and development of additional gas reserves.

The FPC's actual performance substantiates this conclusion.

In the major independent producer gas rate cases, the central controversies have involved what should be allowed as capital costs, what are operating costs, what should be allowed as a fair return on an investment (including such questions as whether expenditures for dry holes or gas of less than pipeline quality constitute capital costs or expenses), should incentives for exploration be allowed, and if so, how much? These are all classical public utility regulatory questions. See e.g., *Austral v. Federal Power Commission*, 428 F. 2d 407

(5th Cir., 1970); *cert. denied, sub nom. Associated Gas Distributors v. Austral*, 400 U.S. 950 (1970).

Consequently the above mentioned FPC regulation constitutes inappropriate public utility treatment of said independent producers and unconstitutional discrimination by advancing the economic interest of another member of the supplier group, the gas utilities, unless some clear-cut justification for it exists.

In addition, there is another closed class created by the above mentioned FPC regulation, the producers of other energy-yielding commodities such as crude oil, coal, liquid petroleum condensates and gas, and nuclear fuels, who are not treated like public utilities and who are regulated primarily, except in emergencies, only by the market mechanism and state conservation laws with respect to the interstate or intrastate wholesale sales of their products.

It should be emphasized that natural gas like crude oil and coal, or for that matter nuclear fuels, is simply an energy-yielding commodity which when consumed yields a given amount of energy per unit of mass or volume consumed. Yet the independent natural gas producer with respect to interstate wholesale sales of natural gas is, among other things, subject to rate regulation and cannot terminate sales to purchasers even after the expiration of said purchaser's sales contract without permission of the FPC. In addition, said producers with respect to said sales are subject to a relatively complex and expensive overall regulatory program to which the producers of the other energy-yielding commodities mentioned herein are not subjected. Consequently, there is further invidious discrimination against said independent natural

gas producers with respect to said sales unless there is some clear-cut justification.

The question then is, is there any clear-cut justification for creation of the two favored closed classes, the gas utilities and the producers of other energy-yielding commodities, thereby permitting FPC regulation of independent natural gas producers with respect to interstate wholesale sales of natural gas and the resulting discrimination? Do the following characteristics of said independent producers, said sales or the product have any special features which will justify the discrimination, mentioned above, resulting from the above mentioned FPC regulation?

(1) Transmission or Transportation Characteristics of the Product.

In this country because of advances in technology related to transmission of fuels, coal slurries, as well as natural gas, crude oil and liquefied petroleum condensates and gases can be transported by pipelines in interstate commerce, either for use or resale at their remote destination. Coal, crude oil, liquid petroleum condensates and gases, and heavier so-called bottle gases (e.g., butane and propane) can also be sold either at the wellhead, mine shaft, excavation pit, refinery or gas processing plant to pipelines for interstate transmission and subsequent resale or sold directly to customers, not for resale, who then use pipeline facilities to transmit the product or commodity to other locations in distant states for use as energy sources. In addition, natural gas itself can be liquefied and shipped via railroad tank car, truck, barge or ocean-going vessel rather than by a pipeline to interstate or foreign des-

tinations either for resale or direct use, just as other hydrocarbon or fossil fuels or even the nuclear fuel, uranium, can be shipped. Consequently, the product has no special features, referred to above, with respect to transmission or transportation.

(2) Scarcity of the Product.

It can be assumed that natural gas is in actual short supply in the United States. So are crude oil, liquid petroleum condensates and gases.

Even nuclear fuel (uranium), still a fuel of the future, is scarce. In discussing the uranium supply problem, President Nixon, on June 4, 1971, stated:

"A major cause of our recent energy problems has been the sharp increase in demand that began about 1967 * * *. But in the last four years it has been growing at a faster pace and forecasts of energy demand a decade from now have been undergoing significant upward revisions.

* * *

"* * * Because of its highly efficient use of nuclear fuel, the breeder reactor *could* extend the life of our natural uranium fuel supply from *decades* to *centuries* * * *" (emphasis added). "Clean Energy Message from The President of the United States." H.R. Doc. 92-118, 92nd Cong., 1st Sess., pp. 1 and 4 (June 4, 1971).

Consequently, the product has no special features, referred to above, with respect to its scarcity.

(3) The Ideal Energy-Yielding Commodity Nature of the Product.

It must be assumed that natural gas is a very excellent energy-

yielding commodity in that it has a high BTU value per unit volume (averaging about 1,000 BTU/cubic foot), and burns without fly ash sulfur oxides, and many products of incomplete combustion such as hydrocarbon radicals and carbon monoxide.

However, nuclear fuels produce no fly ash, sulfur oxide or hydrocarbon combustion air pollution products and have a much higher BTU content per unit consumed (whether by weight or volume). Moreover, both refining and combustion processes are being developed to decrease markedly the pollution problems caused by consumption of crude oil products and work is proceeding on developing "synthetic" gas by hydrogenation of coal. Consequently, natural gas is an excellent energy-yielding commodity, but is not the ideal energy-yielding commodity. It clearly is and has been the preferred commodity because of its artificially low price which has resulted from the discriminatory regulation discussed in this brief. Consequently, the product has no special features, referred to above, with respect to its being the ideal energy-yielding commodity.

(4) Monopolistic Characteristics of Independent Producers.

Production and interstate wholesale sale of natural gas by independent natural gas producers as distinguished from interstate pipeline transportation and distribution to ultimate consumers, is not and has not been monopolistic, but competitive. See generally "Utility Corporations, Final Report of the Federal Trade Commission to the Senate of the United States pursuant to Senate Resolution No. 83," 70th Cong., 1st Sess., No. 84-A (1936); see also *Permian Basin Area Rate Cases*, 390 U.S. 747 at 756-757 (1968). The competition is

as great or greater than among producers of other fuels such as coal, crude oil, liquefied petroleum condensates and gas and uranium, in addition to producers in other industries such as automobiles.

In 1970, according to the FPC itself, there were over 4,600 independent producers engaged in interstate sales of natural gas for resale and 70 independent producers controlled a total of approximately 85 percent of the interstate sale for resale market nationwide (with no measurement of the intrastate market which is quite sizeable and has been preferred wherever possible by many independent producers because of FPC regulation of the interstate market). Furthermore, new firms are entering the interstate sale for resale market. In 1962, 10% of this particular market was occupied by firms entering after 1960. *Hodges*, "Natural Gas: Price Regulation v. Supply," unpublished *Richard J. Gonzales Lecture*, April 23, 1970, College of Business Administration, University of Texas.

If production rather than markets is analyzed, the four largest independent producers at the national level controlled 32.1% of production and the eight largest independent producers controlled 37.6% of production as of 1962. By way of contrast, the production concentration for the four largest producers of *all products* in the United States was 40% with many basic products such as automobiles, copper, soap, glass, electric light bulbs, and photography equipment showing of 90% or above among the four largest producers of each product. *Hodges*, *supra*.

By disaggregating the national market on a regional basis, the top four independent gas producers in 1962 controlled

only 24.7% of the Gulf Coast regional market for interstate sales for resale, and 22.9% of the Mid-Continent-Permian Basin regional market for interstate sales for resale. Furthermore, the big four in the Mid-Continent-Permian Basin area are not necessarily the same as the big four in the Texas-Gulf Coast, Southern Louisiana or Rocky Mountain areas. *Hodges, supra*.

Consequently, said producers have no special features, referred to above, with respect to monopolistic characteristics except for their being highly competitive.

Consequently, any and all FPC regulation of said independent producers with respect to interstate wholesale sales of natural gas creates invidious discrimination which cannot be justified and is more than unwise, improvident or out of harmony with a particular school of thought. *Williamson v. Lee Optical Co. of Oklahoma*, 348 U.S. 483 (1955), *Morey v. Doud*, 354 U.S. 457 (1957).

This is not to say or even imply that the Natural Gas Act is totally unconstitutional or even that its application to control field prices of gas charged by producer-affiliates or subsidiaries of interstate gas transmission companies is unconstitutional. It is FPC regulation of any independent natural gas producers with respect to interstate wholesale sales of natural gas that is unconstitutional.

B. ANY AND ALL FPC REGULATION OF INDEPENDENT PRODUCERS WITH RESPECT TO INTERSTATE WHOLESALE SALES OF NATURAL GAS HAS HAD AN ADVERSE EFFECT ON THE CONSERVATION POLICIES OF THE STATES, DEPRIVING THE STATES OF WHAT THIS COURT IN *Champlin Refining Company v. Corporation*

Commission of Oklahoma, 286 U.S. 210 (1932), SAID IS AN INHERENT PART OF THE POLICE POWER — THE PREVENTION OF ABOVE AND BELOW GROUND WASTE OF OIL AND GAS — AND THEREBY VIOLATES THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This argument is well summed up in an article by the late Ernest O. Thompson. Thompson, "The Texas Market Demand Statute on Oil and Gas and its Application," 39 Tex. L. Rev. 139 (1960). In that article, Thompson, who was at the time the Chairman of the Texas Railroad Commission, in describing the Texas oil and gas conservation policy which remains effective today, referred to statutes and court decisions which enunciate said policy and concluded that said policy is based on prevention of underground and above ground waste, including economic waste.

The real issue for this Court is: Does the above mentioned FPC regulation negate this state policy by causing waste, because artificially low prices caused by said application and regulation might dictate either premature abandonment of wells or failure to complete wells, both of which can result in permanent "flooding out or drowning" of geological formations capable of producing gas and/or associated oil and permanent loss of recoverable oil and gas in place?

In light of the high cost of regulation, even if a special exception is allowed by the FPC with respect to gas prices from certain wells to prevent waste, such an exception frequently will not be sought, and FPC-dictated artificially low gas prices with respect to said sales by said producers can cause otherwise premature abandonment or failure to complete in spite

of an adequate market demand and adequate pipeline capacity to transport the gas to willing and needy buyers.

Although there are no real precedents dealing with the scope or weight of the Tenth Amendment to the Constitution of the United States in a situation such as this, a collision between Federal authority and the legitimate exercise of the states' police power has occurred which in this case should be resolved in favor of the states' police power because without the conservation program of the states working properly, there will be no supply of natural gas to be sold to consumers at just and reasonable prices or at any price.

See Note, "Conservation of Natural Gas and the Federal-State Conflict," 64 *Colum. L. Rev.* 888 (1964).

II

**JUDICIAL REMOVAL OF ANY AND ALL FPC
REGULATION OF INDEPENDENT PRODUCERS
WITH RESPECT TO INTERSTATE WHOLESALE
SALES OF NATURAL GAS SHOULD HAVE NO
EFFECT ON ANY ACTIONS, SALES, REGULA-
TIONS OR OPERATIONS OF SUCH INDEPEND-
ENT PRODUCERS UNTIL AFTER THE EFFEC-
TIVE DATE OF SAID REMOVAL.**

This point is well supported by the jurisprudence of this Court. In *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), this Court held that a later holding of unconstitutionality of a Federal Statute would not operate retroactively so as to render previous judgments under

the law later determined to be unconstitutional, null and void.
That decision is still good law today.

CONCLUSION

For the above reasons, Respondent Forgotson respectfully
prays that the judgment of the Court below be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that a copy of the foregoing Brief has this the day of January, 1974 been served upon each counsel of record for respondents in accordance with Rule 33 of this Court, by depositing the same in a United States mail box, with first class postage prepaid, addressed to said counsel at their post office addresses.

Edward H. Forgotson

ADDENDUM A

CONSTITUTION

**AMENDMENT V — CAPITAL CRIMES; DOUBLE
JEOPARDY; SELF-INCRIMINATION; DUE PROCESS;
JUST COMPENSATION FOR PROPERTY**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT X — RESERVED POWERS TO STATES

The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.